

**United States Department of Labor
Employees' Compensation Appeals Board**

A.S., Appellant

and

**U.S. POSTAL SERVICE, PHILADELPHIA
PROCESSING & DISTRIBUTION CENTER,
Philadelphia, PA, Employer**

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**Docket No. 20-1506
Issued: August 25, 2021**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 12, 2020 appellant, through counsel, filed a timely appeal from a July 1, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the July 1, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to establish a recurrence of disability commencing February 15, 2019 causally related to his accepted February 11, 2018 employment injury.

FACTUAL HISTORY

On February 14, 2018 appellant, then a 53-year-old mail handler/equipment operator, filed a traumatic injury claim (Form CA-1) alleging that on February 11, 2018 he tripped and fell in the employing establishment parking lot. He stopped work on February 12, 2018. On March 16, 2018 appellant underwent a right insertional Achilles reconstruction with calcaneal osteotomy, which was performed by Dr. David I. Pedowitz, a Board-certified orthopedic surgeon and foot and ankle surgery specialist. Following further development regarding the parking lot premises where the incident occurred, OWCP accepted the claim for strain of right Achilles tendon, sprain of other specified parts of right knee, sprain of unspecified ligament of right ankle, sprain of muscle, fascia and tendon of lower back, and contusion of right knee. It paid appellant appropriate wage-loss compensation on the supplemental rolls from April 1, 2018 through January 30, 2019. Effective January 31, 2019, appellant returned to work in a full-time capacity. He stopped working on February 15, 2019.

On July 22, 2019 appellant filed claims for compensation (Form CA-7) for a total of 713 hours due to total disability for the period February 15 through August 2, 2019.

OWCP received reports from Dr. Michael D. Flanagan, a Board-certified internist, dated May 14, May 31, June 12 and July 12, 2019. In a May 14, 2019 letter, Dr. Flanagan noted that appellant had low back pain with radiculopathy for which appellant had a lumbar 4-5 bilateral decompressive surgery on September 12, 2014, a right Achilles tendon rupture repaired on March 16, 2018, and end-stage osteoarthritis of left knee. He indicated that appellant followed through on his postoperative care including physical therapy and attempted to return to work at the end of January 2019. However, Dr. Flanagan was unable to perform the duties of his job due to severe pain in all three of these musculoskeletal regions. He noted that appellant's position required operation of a standing forklift, which required twisting motion and repetitive flexion of his lumbar spine, knees and ankle. Dr. Flanagan opined that appellant was unable to currently return to work and that appellant would be unable to perform the functions of his job in the future. In the May 31, 2019 report, he added the additional diagnoses of: neuropathy of right great toe, contusion of left knee and neuropathy of right ring and little fingers.

In a May 29, 2019 report, Dr. Pedowitz indicated that appellant was doing well following his right insertional Achilles reconstruction with a flexor hallucis tendon transfer and lengthening. He noted that appellant walked with a slightly antalgic gait which he attributed to knee pain. Dr. Pedowitz indicated that appellant could continue with all his activities as tolerated, noting that his primary care physician had restricted appellant from returning to work.

In a July 23, 2019 prescription note, Dr. Ira C. Sachs, an osteopath Board-certified in orthopedic surgery, noted that appellant was seen for right ankle, Achilles and right knee problems, and that it was his understanding that appellant also injured his left knee on February 11, 2018.

In a development letter dated August 14, 2019, OWCP noted receipt of appellant's CA-7 forms and that appellant stopped working on February 15, 2019 following his return to work in a full-time capacity on January 31, 2019. It related that it appeared that appellant was claiming disability due to a material change/worsening of his accepted employment-related conditions and provided a definition of a recurrence of disability. OWCP advised appellant of the deficiencies in the medical evidence provided and advised that he should submit a narrative medical report from his physician that addressed why his current disability was causally related to the accepted employment injury and demonstrate with clinical findings that the accepted condition had materially worsened/changed without intervening cause to the point that he was disabled from performing his work duties. It also requested him to respond to questions on the attached questionnaire. OWCP afforded appellant 30 days to submit the necessary evidence.

Progress reports from Dr. Pedowitz were received by OWCP. In a February 6, 2019 report, Dr. Pedowitz reported that appellant's recovery was proceeding well with regard to the insertional Achilles repair with rupture and that appellant had returned to work two weeks prior at full duty. He reported that appellant was having issues with his left knee. Dr. Pedowitz indicated that appellant could continue to work full time as he continued to advance with all activities as tolerated and kept working on strengthening exercises and weight loss. He indicated that he would only see appellant going forward on an as-needed basis. In an August 22, 2019 medical note, Dr. Pedowitz indicated that appellant ruptured his right Achilles tendon on February 11, 2018, he had surgery to repair the tendon, and was advised not to return to work until January 30, 2019 while he was recovering from surgery.

In a September 12, 2019 report, Dr. Sachs, noted the history of appellant's February 18, 2018 employment injury, that appellant returned to work on January 31, 2019, and stopped work on February 14, 2019 because of pain. He reported examination findings and provided an assessment of pain in left knee, Achilles bursitis of right lower extremity, bilateral primary osteoarthritis of knee, low back pain, bilateral knee degenerative joint disease, status post Achilles reconstruction with residual Achilles tendinitis, and complaints of low back pain. In a September 12, 2019 prescription note, Dr. Sachs indicated that appellant had right Achilles rupture February 11, 2018 and surgery on March 16, 2018. He opined that appellant was disabled from date of injury until January 31, 2019.

Appellant continued to file additional CA-7 forms claiming disability.

By decision dated October 1, 2019, OWCP denied appellant's recurrence claim. It noted that it was unclear as to how his work stoppage was attributable to his February 11, 2018 employment injury and found that appellant had not established that he was totally disabled due to a material change/worsening of the accepted work-related conditions. OWCP noted that an increase in pain does not constitute objective evidence of disability.

In an October 1, 2019 statement, appellant indicated that he returned to work on January 30, 2019 and worked some days, but used his annual and sick leave for the rest of the days as the pain worsened in his ankle, knees and back. He noted that his primary physician took him

off work on February 14, 2019. Appellant also advised that he had a full rupture of his Achilles tendon.⁴

In June 12 and November 5, 2019 letters, Dr. Flanagan reiterated that appellant's position required a great deal of twisting motion and repetitive flexion of his lumbar spine, knees and ankles. He opined that appellant was unable to work at this time. In a July 12, 2019 duty status report (Form CA-17), Dr. Flanagan opined that appellant was unable to work and noted restrictions.

On November 9, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated December 5, 2019, OWCP denied appellant's request for a hearing as it was not timely filed within 30 days of the most recent OWCP decision.

In a February 12, 2020 letter, appellant, through counsel, argued that appellant's claim should not be viewed as a recurrence "but rather a continuation of the ongoing matter."⁵

Additional medical reports from Dr. Flanagan dated June 12, July 12, August 8, September 17, and November 5, 2019 were received. In February 14, and March 3, 2019 letters, Dr. Flanagan reiterated that appellant's position required a great deal of twisting motion and repetitive flexion of his lumbar spine, knees and ankles. He opined that appellant was unable to work. In a March 3, 2020 note, Dr. Flanagan opined that appellant could return to sedentary work on March 9, 2020 with restrictions.

Progress reports dated February 2 and May 7, 2019 progress report from a physician assistant, were also received.

On April 2, 2020 appellant, through counsel, requested reconsideration. A copy of Dr. Flanagan's February 14, 2019 letter was resubmitted.

In a separate letter dated April 2, 2020, appellant, through counsel, requested that the acceptance of appellant's claim be expanded to include the conditions of neuropathy of right great toe, contusion of left knee, and neuropathy of the right ring and little fingers.

By decision dated July 1, 2020, OWCP denied modification of its October 1, 2019 decision with regard to appellant's recurrence claim and compensation for wage loss. It related that the evidence of record did not establish the basis of appellant's recurrence claim because the medical

⁴ A copy of Dr. Sachs February 23, 2018 progress note which noted an impression of complete Achilles tendon rupture was provided along with page 2 of OWCP's hearing representative's decision, with a highlighted portion pertaining to appellant's testimony regarding the history of the February 12, 2018 incident. A February 21, 2018 magnetic resonance imaging (MRI) scan of the right ankle revealed a complete disruption of the Achilles tendon.

⁵ In a February 12, 2020 letter, appellant, through counsel, requested that the claim be corrected from the right knee and changed to the left knee.

evidence of record did not establish that the appellant's disability was the result of the original injury on February 11, 2018.⁶

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.⁷ This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations, and which is necessary because of a work-related injury or illness, is withdrawn or altered so that the assignment exceeds the employee's physical limitations. A recurrence does not occur when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force.⁸

OWCP's procedures discuss the evidence necessary if recurrent disability for work is alleged within 90 days of return to duty.⁹ The focus is on disability rather than causal relationship of the accepted condition to the employment injury.¹⁰ The Board has held that, if recurrent disability from work is claimed within 90 days or less from the first return to duty, the attending physician should describe the duties which the employee cannot perform and demonstrate objective medical findings that form the basis for the renewed disability from work.¹¹

ANALYSIS

The Board finds that the case is not in posture for decision.

As noted above, OWCP's procedures provide that, in cases where recurrent disability from work is claimed within 90 days or less from the first return to duty, the claimant is not required to produce the same evidence as for a recurrence claimed long after apparent recovery and return to work.¹² In cases where recurring disability from work is claimed within 90 days or less from the first return to duty, the focus is on disability rather than causal relationship.¹³ The attending

⁶ OWCP also indicated that appellant's claim to include additional diagnoses of neuropathy of right great toe, contusion of left knee, and neuropathy of the right ring and little fingers would not be expanded at this time as a supplemental medical report from appellant's physician was needed which provided an explanation as to whether and how those conditions were caused or aggravated by the work injury. The Board notes that OWCP has not issued a final decision on appellant's claim for expansion to include additional conditions. Therefore, this issue is not properly before the Board on this appeal. See 20 C.F.R. §§ 501.2(c) and 501.3.

⁷ 20 C.F.R. § 10.5(x); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

⁸ *Id.*

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5.(June 2013). *F.C.*, Docket No. 18-0334 (issued December 4, 2018). See also *M.H.*, Docket No. 19-1552 (issued February 2, 2021).

¹⁰ *M.H.*, *id.*

¹¹ *A.B.*, Docket No. 18-0978 (issued September 6, 2019); *J.F.*, 58 ECAB 124 (2006).

¹² *Supra* note 10; *R.W.*, Docket No. 17-0720 (issued May 21, 2018).

¹³ *Id.*; *K.R.*, Docket No. 19-0413 (issued August 7, 2019).

physician should describe the duties which the employee cannot perform and the demonstrated objective medical findings that form the basis for the renewed disability from work.¹⁴

Appellant stopped work on February 12, 2018 and returned to work on January 31, 2019, in a full-time capacity. He stopped working again on February 15, 2019 and filed claims for wage-loss compensation. As appellant claimed a recurrence of disability within 90 days of his first return to duty, OWCP should have developed and decided the claim under the proper recurrence standard, focusing on disability rather than causal relationship.¹⁵ However, the August 14, 2019 OWCP development letter improperly instructed him to provide medical evidence in accordance with the standard for a recurrence of disability claim after 90 days of his return to duty, which required that he establish a change in his medical condition.¹⁶

OWCP's procedures provide that OWCP is responsible for requesting evidence.¹⁷ Its procedures further provide that the claims examiner should contact the claimant in writing to obtain evidence and should specifically request the information needed, tailored to the specifics of the individual case.¹⁸ In this instance, OWCP improperly developed appellant's claim under the standard for a recurrence of disability claim after 90 days from return to duty.¹⁹ As he failed to receive the proper guidance from OWCP regarding the specific evidence required to establish a recurrence claim within 90 days of his return to duty, the Board finds that this case must be remanded for further development.²⁰ Following such further development as it deems necessary, OWCP shall issue a *de novo* decision.²¹

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant has met his burden of proof to establish a recurrence of disability beginning February 15, 2019 causally related to his accepted February 11, 2018 employment injury.

¹⁴ *Supra* note 10 at Chapter 2.1500.5(b). *See A.C.*, Docket No. 17-0384 (issued September 11, 2017).

¹⁵ *Id.*; *Order Remanding Case*, Docket No. 18-0604 (issued October 21, 2019).

¹⁶ *Supra* note 10 at Chapter 2.1500.6.

¹⁷ *Id.* at Chapter 2.800.4(c)(2) (June 2011).

¹⁸ *Id.* at Chapter 2.800.5. *See also V.R.*, Docket No. 16-1167 (issued December 22, 2016).

¹⁹ *Order Remanding Case*, Docket No. 19-0763 (issued November 26, 2019).

²⁰ *Id.*

²¹ *See M.H.*, Docket No. 19-1552 (issued February 2, 2021); *B.N.*, Docket No. 17-0787 (issued July 6, 2018); *C.D.*, Docket No. 17-1074 (issued August 28, 2017).

ORDER

IT IS HEREBY ORDERED THAT the July 1, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 25, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board